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IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

G

Petitioner;

and

G

Respondent.

(Needs, Discovery and Coercive Control)

Miss Trainor (instructed by King and Boyd) for the Petitioner
Miss Brown (instructed by Flynn & McGettrick) for the Respondent

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Master Bell

[1] On the face of it this is a simple case. The wife seeks 100% of the equity in the matrimonial home together with a 38.6% share of the husband's pension. On the other hand, the husband argues that the equity in the home ought to be divided on the basis of the wife receiving 65% and him receiving 35% and that there ought to be a 21% pension sharing order. Nevertheless, despite the apparent simplicity, the decision in this case required the consideration of a number of issues, namely the general principles to be applied in ancillary relief proceedings, the needs-based approach, the importance of discovery, and whether the evidence demonstrated the

existence of coercive control. I shall deal with the law on the first three of those matters before I summarise the evidence. Once I summarise the evidence, I shall consider the Article 27 factors which were relevant in this case and, when dealing with the factor of conduct, I will explain why it was necessary to consider the issue of coercive control and why I concluded that it had not been present in this case.

GENERAL PRINCIPLES TO BE APPLIED

[2] Miss Brown submitted that this was a needs-based case. Miss Trainor submitted, on instructions, that this was not a case to be decided on the basis of the needs-based approach but rather one which ought to be decided on the basis of the sharing principle. This disagreement provides a useful opportunity to restate the fundamental principles which apply in ancillary relief proceedings.

[3] In *WC v HC* [2022] EWFC 22 Peel J summarised, in a Mostynesque fashion, the principles which are to be applied in ancillary relief applications:

> "The general law which I apply is as follows:
>
> i) As a matter of practice, the court will usually embark on a two-stage exercise, (i) computation and (ii) distribution; *Charman v Charman* [2007] EWCA Civ 503.
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> ii) The objective of the court is to achieve an outcome which ought to be "as fair as possible in all the circumstances"; per Lord Nicholls at 983H in *White v White* [2000] 2 FLR 981.
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> iii) There is no place for discrimination between husband and wife and their respective roles; *White v White* at 989C.
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> iv) In an evaluation of fairness, the court is required to have regard to the s25 criteria, first consideration being given to any child of the family.
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> v) S25A is a powerful encouragement towards a clean break, as explained by Baroness Hale at [133] of *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186.
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> vi) The three essential principles at play are needs, compensation and sharing; *Miller; McFarlane*.
>
> vii) In practice, compensation is a very rare creature indeed. Since *Miller; McFarlane* it has only been applied in one first instance reported case at a final hearing of financial remedies, a decision of Moor J in *RC v JC* [2020] EWHC 466 (although

there are one or two examples of its use on variation applications).

viii) Where the result suggested by the needs principle is an award greater than the result suggested by the sharing principle, the former shall in principle prevail; *Charman v Charman*.

ix) In the vast majority of cases the enquiry will begin and end with the parties' needs. It is only in those cases where there is a surplus of assets over needs that the sharing principle is engaged.

x) Pursuant to the sharing principle, (i) the parties ordinarily are entitled to an equal division of the marital assets and (ii) non-marital assets are ordinarily to be retained by the party to whom they belong absent good reason to the contrary; *Scatliffe v Scatliffe* [2017] 2 FLR 933 at [25]. In practice, needs will generally be the only justification for a spouse pursuing a claim against non-marital assets. As was famously pointed out by Wilson LJ in *K v L* [2011] 2 FLR 980 at [22] there was at that time no reported case in which the applicant had secured an award against non-matrimonial assets in excess of her needs. As far as I am aware, that holds true to this day.

xi) The evaluation by the court of the demarcation between marital and non-martial assets is not always easy. It must be carried out with the degree of particularity or generality appropriate in each case; *Hart v Hart* [2018] 1 FLR 1283. Usually, non-marital wealth has one or more of 3 origins, namely (i) property brought into the marriage by one or other party, (ii) property generated by one or other party after separation (for example by significant earnings) and/or (iii) inheritances or gifts received by one or other party. Difficult questions can arise as to whether and to what extent property which starts out as non-marital acquires a marital character requiring it to be divided under the sharing principle. It will all depend on the circumstances, and the court will look at when the property was acquired, how it has been used, whether it has been mingled with the family finances and what the parties intended.

xii) Needs are an elastic concept. They cannot be looked at in isolation. In *Charman* (supra) at [70] the court said:

> "The principle of need requires consideration of the financial needs, obligations and responsibilities of the

> parties (s.25(2)(b); of the standard of living enjoyed by the family before the breakdown of the marriage (s.25(2)(c); of the age of each party (half of s.25(2)(d); and of any physical or mental disability of either of them (s.25(2)(e)".

xiii) The Family Justice Council in its Guidance on Financial Needs has stated that:

> "In an appropriate case, typically a long marriage, and subject to sufficient financial resources being available, courts have taken the view that the lifestyle (i.e "standard of living") the couple had together should be reflected, as far as possible, in the sort of level of income and housing each should have as a single person afterwards. So too it is generally accepted that it is not appropriate for the divorce to entail a sudden and dramatic disparity in the parties' lifestyle."

xiv) In *Miller; McFarlane* Baroness Hale referred to setting needs "at a level as close as possible to the standard of living which they enjoyed during the marriage". A number of other cases have endorsed the utility of setting the standard of living as a benchmark which is relevant to the assessment of needs: for example, *G v G* [2012] 2 FLR 48 and *BD v FD* [2017] 1 FLR 1420.

xv) That said, standard of living is not an immutable guide. Each case is fact-specific. As Mostyn J said in *FF v KF* [2017] EWHC 1093 at [18];

> "The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise".

xvi) I would add that the source of the wealth is also relevant to needs. If it is substantially non-marital, then in my judgment it would be unfair not to weigh that factor in the balance. Mostyn J made a similar observation in *N v F* [2011] 2 FLR 533 at [17-19]."

[4] I therefore disagree with the submission made on behalf of the husband that this is not a needs-based case and that the sharing principle ought to be applied. The ninth principle summarised above by Peel J deals

with this submission succinctly. This is not a case where there is a surplus of assets over needs and it is therefore clearly a needs-based case.

NEEDS-BASED CASES

[5] I have considered it necessary in a number of recent Financial Dispute Resolution hearings to emphasise that ancillary relief decisions cannot be formula-driven, where legal representatives fall back on proportions derived from previous cases with vaguely similar sets of facts. To do so compromises a genuine commitment to the needs-based principle articulated in *Miller v Miller; McFarlane v McFarlane*. There requires to be a certain degree of recalibration on this issue and it may therefore be helpful to remind practitioners at large, in fuller detail than usual, of the principles to be applied in needs-based cases.

[6] The starting point for ancillary relief decision-making is the legislation provided by Parliament. Article 27 of the Matrimonial Causes Order (Northern Ireland) 1978 requires, as one of the factors to be taken into account, that the court considers:

> "the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future."

[7] As Roberts J observed in *Juffali v Juffali* [2016] EWHC 1684 (Fam) there is no statutory definition of "needs" in the applicable law. The Law Commission for England and Wales similarly stated that needs "is a very broad concept with no definition in family law" (Law Commission Report number 343).

[8] In the light of this statutory provision, it is the duty of legal representatives to present the court with full and proper evidence of the needs of the party they represent. As Moor J said in *LMZ v AMZ* [2024] EWFC 28:

> "Needs must always be assessed on the facts of each particular case."

It must therefore be emphasised that the needs of the parties are to be determined from the facts proved in evidence and not simply an issue to be addressed in submissions by counsel. At a hearing, this will require, at very least, the representatives of each party to call evidence on the realistic, (but not inflated), housing, income and other needs of their client in the light of that party's circumstances. At the FDR stage, although evidence will not be called, counsel must nevertheless deal with the issue of needs in the core issue documents to an appropriate degree. It can never be sufficient to pay lip service to the concept of need.

[9] In *Miller v Miller; McFarlane v McFarlane* Lord Nicholls noted that most of the needs of the parties will have been generated by the marriage, but not all of them. Needs arising from age or disability may be examples of the latter. In the same decision, Baroness Hale observed:

> "The most common source of need is the presence of children, whose welfare is always the first consideration, or of other dependent relatives, such as elderly parents. But another source of need is having had to look after children or other family members in the past. Many parents have seriously compromised their ability to attain self-sufficiency as a result of past family responsibilities. Even if they do their best to re-enter the employment market, it will often be at a lesser level than before, and they will hardly ever be able to make up what they have lost in pension entitlements. A further source of need may be the way in which the parties chose to run their live together. Even dual career families are difficult to manage with completely equal opportunity for both. Compromises often have to be made by one so that the other can get ahead. All couples throughout their lives together have to make choices about who will do what, sometimes forced upon them by circumstances such as redundancy or low pay, sometimes freely made in the interests of them both. The needs generated by such choices are a perfectly sound rationale for adjusting the parties' respective resources in compensation."

[10] Needs do not exist in a vacuum. What is clear is that needs in a particular case have to be assessed by reference to other matters. In *Juffali v Juffali* Roberts J identified a number of important principles:-

> "(i) The first consideration in any assessment of needs must be the welfare of any minor child or children of the family.
>
> (ii) After that, the principal factors which are likely to impact on the court's assessment of needs are (a) the length of the marriage; (b) the length of the period, following the end of the marriage, during which the applicant spouse will be making contributions to the welfare of the family; (c) the standard of living during the marriage; (d) the age of the applicant; and (e) the available resources as defined by section 25(2)(a).
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> (iii) There is an inter-relationship between the level at which future needs will be assessed and the period during which a court finds those needs should be met by the paying former

> spouse. The longer that period, the more likely it is that a court will not assess those needs on the basis throughout of a standard of living which replicates that enjoyed during the currency of the marriage.
>
> (iv) In this context, it is entirely principled in terms of approach for the court to assess its award on the basis that needs, both in relation to housing and income, will reduce in future in an appropriate case."

[11] An example of how needs have to be assessed in relation to, for example, the length of the marriage, may be gained from the decision in *McCartney v Mills McCartney* [2008] EWHC 401 (Fam) where the court held that in a short marriage case it was legitimate to look at the claimant's needs more conservatively than in a long marriage, because the standard of living that had a bearing on assessment of need had been enjoyed for a shorter period. After a short marriage to a very wealthy man it was unfair and completely unrealistic for the wife to expect to continue to live at the same rate as during the marriage.

[12] In practice the most common elements of a party's needs will be the need for accommodation and the need for ongoing income. However, the Family Justice Council for England and Wales demonstrated in their April 2018 publication "Guidance on Financial Needs in Divorce" that a wide range of aspects of life have been taken into account in terms of needs. These have included: removal expenses and home decoration, furniture, car purchase, discharge of debts, course fees for retraining, and a contingency fund for unforeseen expenses.

[13] Although the need for accommodation will usually be the primary need for the parties, Lord Hoffman indicated in *Piglowska v Piglowski* [1999] 3 All ER 632, that this does not mean that both spouses invariably have a right to purchase accommodation. Rental accommodation may be all that is possible.

[14] Once needs have been identified, how should those needs be met? As the Family Justice Council observed:

> "How those needs are most appropriately met and by what form of order, whether by capital provision or (spousal) periodical payments or both, will depend on all the circumstances of the case, in particular the extent of the available capital and income, including – where appropriate – welfare benefits, tax credits and borrowing capacity, as well as existing debts."

[15] Lord Nicholls recognised in *Miller v Miller; McFarlane v McFarlane* the immensely difficult task that often faces an ancillary relief court in its attempt to meet the parties' needs out of the available assets:

> "In most cases the available assets are insufficient to provide adequately for the needs of two homes. The court seeks to stretch modest finite resources so far as possible to meet the parties' needs. Especially where children are involved it may be necessary to augment the available assets by having recourse to the future earnings of the money-earner, by way of an order for periodical payments."

[16] This difficult task was further commented upon by Moor J in *Butler v Butler* [2023] EWHC 2453 (Fam):

> "The fact that a judge rightly concludes that a case is a "needs" case does not mean that the judge must then make an order that satisfies both parties' needs. In one sense, this is obvious, because there may simply be insufficient assets to satisfy the needs of either party, let alone both. I take the view, however, that it goes further than that. There will be many cases where there are sufficient assets to meet both parties needs and it is undoubtedly right to do so, even if that means invading non-matrimonial property. There will, however, be a different category of case where the assets may only be barely sufficient to do so or, potentially, not sufficient."

[17] In many cases therefore the court is faced with choosing whatever might be the least-worst option. Sometimes the unfortunate reality is that the court cannot protect the parties from the painful financial consequences of divorce. As the Family Justice Council guidance observes:

> "This is likely to involve meeting needs at what might be a relatively modest level. The court's priority is likely to be to provide a home for the children and one, or possibly both, of the parents. "

By contrast, where there are more resources (including income) available, and a higher standard of living has been enjoyed, need is likely to be assessed more generously.

[18] One of the difficulties in ancillary relief practice is that many of the leading judgments arise from what are often referred to as "big money" cases but yet the vast majority of the cases that come before the courts are "small money" cases. In *McCartney v Mills McCartney*) the total assets amounted to £400 million. The wife considered that her needs were for a home in London,

a property in New York and an office in London or Brighton from which to conduct her charitable and business activities. In addition to these capital needs, the wife sought a sum of £3.25 million per annum in respect of income needs, a figure which Bennett J decided was unreasonable, despite his stated willingness to generously interpret her income needs. Ultimately, the amount awarded to the wife on a needs basis was £16.5 million (taking her total assets to £24.3 million). According to the Family Justice Council guidance, although some judges have criticised the expression "generously interpreted" as an impermissible judicial gloss on the language of the statute which is liable to create its own confusion, the expression has gained general acceptance and was, for example, adopted by the majority in *Radmacher v Granatino* [2010] UKSC 42. It is arguable, however, that in "small money" cases, the kind of cases where the court "seeks to stretch modest finite resources so far as possible to meet the parties' needs" (*IX v IY (Financial Remedies: Unmatched Contributions)* [2018] EWHC 3053 (Fam)), there will be insufficient assets to "generously interpret" needs.

[19] It is important to bear in mind that there is no restriction on the source of the assets which might be deployed to meet needs. The distinction between matrimonial and non-matrimonial property has no relevance in such a case. (*M-D v D* [2009] FLR 810). To express this idea in a different way, as the court cogently explained in *WX v HX and Others* [2023] EWFC 279 (B), in a needs-based case "arguments about the origins of a given asset can be expected to carry little weight, if any."

[20] In needs-based cases it is, of course, the needs of both parties which require to be assessed and not just the needs of the petitioner. Moor J emphasised this principle in *A v L (Departure from Equality: Needs)* [2011] EWHC 3150 (Fam**):**

> "I entirely accept that needs can justify a departure from equality but, if the court is to do so, it is necessary to consider the needs of both parties. I equally accept that disparity in earning capacity can justify departure, but again this has to be considered in the context of the needs of both parties not just the wife. Where resources are limited, the needs of the applicant – still typically the wife, with whom any children of the family may continue to make their primary home – will predominate. However, both parties will still need a home and an income and the financial means to maintain contact with any children of the family and share in their care. And so even in such modest or "small money" cases, a balance must be struck to ensure that any order is fair. A failure to consider the "financial needs" of both parties may render an order unfair, and so liable to be set aside on appeal."

[21] Although parties may each put forward a subjective assessment of what needs will amount to, the court has discretion in assessing what meeting those needs will require. In *BL v OR* [2023] EWFC 229 Sir Johnathan Cohen observed:

> "It should also be recognised that even in a case where the court considers a needs-based approach to be fair, the court will, as in *KA v MA* [2018] EWHC 499 (Fam), retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs.

[22] In *FF v KF* [2017] EWHC 1093 (Fam) Mostyn J went even further than this when he stated:

> "18. So far as the "needs" principle is concerned there is an almost unbounded discretion. The main rule is that, save in a situation of real hardship, the "needs" must be causally related to the marriage. Like equity in the old days, the result seems to depend on the length of the judge's foot. It is worth recalling that Heather Mills-McCartney was awarded over £25m to meet her "needs" (*McCartney v McCartney* [2008] EWHC 401 (Fam)). Mrs Juffali was awarded £62m to meet her "needs" (*Juffali v Juffali* [2016] EWHC 1684 (Fam)). In the very recent case of *AAZ v BBZ* [2016] EWHC 3234 (Fam) the court assessed the applicant-wife's "needs" in the remarkable sum of £224m. Plainly "needs" does not mean needs. It is a term of art. Obviously, no-one actually needs £25m, or £62m, or £224m for accommodation and sustenance. The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise."

[23] This broad discretion in the application of the needs principle does not, of course, mean that a financial claim by one party does not require to be justified by a rational analysis. In *Scheeres v Scheeres* [1999] 1 FLR 241, Thorpe LJ said, at p 243G–H:

> "It is very important in these ancillary relief cases, where the court exercises a very broad discretion, that the judge should carry out the section 25 exercise rigorously, in an attempt to inject some sort of clear rationality and principle to what otherwise could be said to be palm tree adjudication."

If that statement is correct, and I consider that it is, then it must also be correct that counsel must articulate to the court a rational analysis of what they say is the reasoning which lies behind the outcome for which they are arguing.

[24] It should be noted that, from time to time, courts have been critical of the unsatisfactory nature of the evidence placed before them in respect of needs and suggest that better evidence be produced in future regarding, for example, the potential costs of alternative housing. (See, for example, *WX v HX and Others* [2023] EWFC 279 (B)). It will not normally be sufficient for a party giving evidence simply to state the cost of buying a home in a certain location will cost a certain price. At very least the witness should produce documentary evidence from print outs obtained from property websites or brochures from estate agents to substantiate such an assertion.

[25] In certain circumstances, conduct may have an impact on the implementation of the needs-based approach. In *TT v CDS* [2020] EWCA Civ 1215 Moylan LJ, giving the decision of the Court of Appeal for England and Wales, approved Moor J's statement in *R v B and Others* [2017] EWFC 33 that, where the court was satisfied that one party had committed litigation conduct, the financial effect of that litigation conduct could impact on a needs-based award because, in attempting to achieve a fair outcome, the court must be entitled to prioritise the needs of the party who has not been guilty of litigation conduct. Indeed, Moylan LJ went so far as to say that the financial consequences of the litigation misconduct, perhaps combined with other factors, might be such that it was fair that the innocent party was awarded all the matrimonial assets. In addition, as I will indicate later, coercive control may have a very significant impact upon the needs of a party if their capacity to engage in financially remunerative employment has been damaged by it.

[26] In some cases, counsel (and the court) will have to conduct two calculations. Firstly, what should a party be awarded on a needs-based calculation and, secondly, what should a party be awarded on a sharing-based clculation. As Williams J summarised the law in *IX v IY (Financial Remedies: Unmatched Contributions)* [2018] EWHC 3053 (Fam):

> "It is well established that the court's award, in cases where the parties' resources exceed their needs, will be the higher of that reached by the application of the sharing principle and that reached by application of the need principle."

In such circumstances therefore counsel will have to calculate, firstly, what their client should be awarded on a needs-based calculation (where non-matrimonial property may be drawn on) and, secondly, what their client should be awarded after a sharing-based calculation (where non-matrimonial property will be excluded from the calculation).

[27] Assessing what are genuine and reasonable needs is not a simple task. Some needs-based claims will be excessive and will require to have items stripped out. Counsel should bear in mind the comments of Bennett J in *McCartney v Mills McCartney*:

> "These items in her budget which I have touched upon above, illustrate generally speaking, how unreasonable (even generously interpreted) are the claimed needs of the wife. In the absence of any sensible proposal by the wife as to her income needs I must do the best I can on the material I have. If the wife feels aggrieved about what I propose she only has herself to blame. If, as she has done, a litigant flagrantly over-eggs the pudding and thus deprives the court of any sensible assistance, then he or she is likely to find that the court takes a robust view and drastically prunes the proposed budget."

In other instances, genuine needs will be downplayed by an opposing party and unrealistically downrated (*BL v OR* [2023] EWFC 229).

[28] I conclude this section on needs by acknowledging that the principles which I have emphasised inevitably make ancillary relief decisions less predictable than they may have previously appeared and create more work for the legal profession because it requires the profession rationally and rigorously to analyse the needs of clients. It similarly makes more work for the court as it attempts to assess the evidence regarding needs which is presented to it. However, such a level of analysis is inevitable if we are to be faithful to the principles outlined in *Miller v Miller; McFarland v McFarlane.*

DISCOVERY IN ANCILLARY RELIEF CASES

[29] I indicated at the beginning of this judgment that this case also involved an issue as to discovery. Before I deal with the specific facts of the case, it may be helpful to make some general observations on discovery in ancillary relief cases.

[30] The Family Proceedings Rules (Northern Ireland) 1996 govern the procedural aspects of matrimonial causes and, in relation to discovery, Rule 2.24 states:

> "A party to a cause or matter may apply for an order for discovery and inspection of documents by an opposite party and RsCJ Order 24 shall apply with the necessary modifications."

[31] The obligation to make discovery is in respect of any documents "relating to any matter in question in the cause or matter" This test requires

discovery of any document which it is reasonable to suppose contains information which may enable a party either to advance his own case or to damage that of his adversary. If it is a document which may lead to a train of enquiry which may have either of those two consequences, it must be discovered (*Peruvian Guano* [1882] 11 QBD 55). This must now be read in conjunction with the overriding objective enshrined in Order 1 Rule 1A of the Rules of the Court of Judicature which requires a court to interpret any obligation under the Rules in a manner which is proportionate and ensures cases are dealt with expeditiously and fairly. The power of the court to make any order in respect of discovery is also subject to the overall principle under Order 24 Rule 9 that the court shall not make any order for discovery unless the court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

[32] The objective of discovery is not only to ensure a fair outcome in the litigation but also to put "cards on the table face up at the earliest stage" in order to avoid increasing costs unnecessarily (*OS v DS* [2004] EWHC 2376 (Fam)).

[33] It is apparent, however, that lack of proper discovery is a perennial problem in ancillary relief. One way that parties attempt to conceal assets or income is by failing to make full and proper discovery. Thie is not, of course, only a problem in Northern Ireland. The problem of non-discovery of matrimonial assets in Canada was described in trenchant terms by Fraser J in *Cunha v. Cunha* (1994) 99 B.C.L.R. (2d) 93 (S.C.), and his description was later approvingly referred to by Canada's Supreme Court in *Leskun v. Leskun*, [2006] 1 S.C.R. 920:

> "Non-disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation. The prolonged stress of unnecessary battle may lead weary and drained women simply to give up and walk away with only a share of the assets they know about, taking with them the bitter aftertaste of a reasonably-based suspicion that justice was not done."

[34] The same problem also exists in England and Wales. In *Goddard-Watts v Goddard-Watts* [2023] EWCA Civ 115 where, subsequent to a consent order, it was found that the husband had, firstly, misrepresented his assets and, secondly, failed to make appropriate disclosure of likely significant capital accumulations in the foreseeable future, Macur LJ had cause to note:

> "Unfortunately, the fact of deliberate non-disclosure in matrimonial financial disputes is not uncommon …"

[35] In *NG v SG (Appeal: Non-disclosure)* [2011] EWHC 3270 (Fam) Mostyn J felt it necessary to address this "regrettably commonplace" phenomenon of non-disclosure in England and Wales:

> "1. The law of financial remedies following divorce has many commandments but the greatest of these is the absolute bounden duty imposed on the parties to give, not merely to each other, but, first and foremost to the court, full, frank and clear disclosure of their present and likely future financial resources. Non-disclosure is a bane which strikes at the very integrity of the adjudicative process. Without full disclosure the court cannot render a true, certain and just verdict. Indeed, Lord Brandon has stated that without it the Court cannot lawfully exercise its powers (see *Livesey (formerly Jenkins) v Jenkins* [1985] FLR 813, HL). It is thrown back on inference and guess-work within an exercise which inevitably costs a fortune and which may well result in an unjust result to one or other party.
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> 2. In *Lykiardopulo v Lykiardopulo* [2011] 1 FLR 1427, CA Thorpe LJ stated:
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> > [36] However ancillary relief proceedings are marked by features absent in other civil proceedings:
> >
> > i) The proceedings are quasi-inquisitorial. The judge must be satisfied that he has, or at least that he has sought, all the information he needs to discharge the duty imposed on him to find the fairest solution.
> >
> > ii) The parties owe the court a duty, a duty of full, frank and clear disclosure. The duty is absolute.
> >
> > iii) Sadly the duty is as much breached as observed. The payer's sense of the obligation is distorted by the emotions aroused by the payee. Breaches take many forms.
> >
> > iv) Breach by omission is commonplace. A bank account or some other asset is not declared. That tactic gives rise to the counter, filching and copying the contents of desk, briefcase or computer (now proscribed by the decision of this court in *Tchenguiz v Imerman* [2010] 2 FLR 814, the effects of which have yet to be worked out).
> >
> > [37] Breaches by commission are more serious. An omission once detected can be excused as an oversight. A breach by commission is plain perjury and thus risks serious consequences. The present case is a good example. The conspiracy within the family to protect the family business resulted in the

> presentation to the court of forged and back-dated documents."

[36] Of course, imperfect discovery does not always mean that there has been an intention to conceal assets from the opposing party and the court. Some people live chaotic and messy lives and imperfect discovery may sometimes be attributable simply to that disorganisation.

[37] However, where a court concludes that failure to make discovery has been intentional, the consequences can be significant. Firstly, a court may draw inferences against such a party. In *Prest v Petrodel Resources Ltd &* Ors [2013] UKSC 34 Lord Sumption said:

> "The modification to which I have referred concerns the drawing of adverse inferences in claims for ancillary financial relief in matrimonial proceedings, which have some important distinctive features. There is a public interest in the proper maintenance of the wife by her former husband, especially (but not only) where the interests of the children are engaged. Partly for that reason, the proceedings although in form adversarial have a substantial inquisitorial element. The family finances will commonly have been the responsibility of the husband, so that although technically a claimant, the wife is in reality dependent on the disclosure and evidence of the husband to ascertain the extent of her proper claim. The concept of the burden of proof, which has always been one of the main factors inhibiting the drawing of adverse inferences from the absence of evidence or disclosure, cannot be applied in the same way to proceedings of this kind as it is in ordinary civil litigation. These considerations are not a licence to engage in pure speculation. But judges exercising family jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing. I refer to the husband because the husband is usually the economically dominant party, but of course the same applies to the economically dominant spouse whoever it is."

[38] Such inferences and adverse conclusions against a party who fails to make discovery were addressed more recently by Peel J in the case of *Ditchfield v Ditchfield* [2023] EWHC 2303 (Fam) where he said:

> "The potential consequences of failure to disclose have been clearly set out in a series of cases summarised in *Moher v Moher* [2019] EWCA Civ 1482. The law is clear. The court is entitled, in the absence of full and frank disclosure, to draw

> adverse conclusions where appropriate, and to the degree of specificity or generality deemed fit. A non-disclosing party cannot complain if the lack of disclosure leads the court to make an order which by necessity is based on less secure foundations than the court would wish; that is the fault of the miscreant party. As Thorpe J (as he then was) said in *F v F* [1994] 1 FLR 359:
>
> > "…if in consequence the obscurity of my final vision results in an order that is unfair to [the husband] it is better that than that I should be drawn into making an order that is unfair to the wife". "

[39] In *NG v SG (Appeal: Non-Disclosure)* [16] Mostyn J stated:

> "Where the court is satisfied that the disclosure given by one party has been materially deficient then: (i) The court is duty bound to consider the process of drawing adverse inferences whether funds have been hidden. (ii) But such inferences must be properly drawn and reasonable. It would be wrong to draw inferences that a party has assets which, on an assessment of the evidence, the court is satisfied he has not got. (iii) If the court concludes that funds have been hidden then it should attempt a realistic and reasonable quantification of those funds, even in the broadest terms. (iv) In making its judgment as to quantification the court will first look to direct evidence such as documentation and observations made by the other party. (v) The court will then look to the scale of business activities and at lifestyle. (vi) Vague evidence of reputation or the opinions or beliefs of third parties are inadmissible in the exercise."

[40] Secondly, a court may consider that a deliberate failure to make full and frank discovery amounts to litigation misconduct. As Mostyn J suggested in *OG v AG* [2020] EWFC 52, where proved, this should be severely penalised in costs.

[41] Thirdly, it is also clear that in gross cases of non-discovery, (and where the solicitor for the innocent party has attached inscribed a penal clause on a discovery order) that a party who has failed to make full and frank discovery may receive a financial penalty or be sent to prison following committal proceedings (*Thursfield v Thursfield (Rev 1)* [2013] EWCA Civ 840).

[42] Fourthly, Order 24 Rule 19 of the Rules of the Court of Judicature provides that any party who is required by any of the rules, or by any order,

to make discovery of documents and who fails to comply with any provision of that rule or with that order, then the court may make such order as it thinks just including, in particular, an order that the proceedings be dismissed or that the defence be struck out and judgment be entered accordingly.

[43] Fifthly, even if not recognised at the time of the hearing, non-discovery may in some circumstances, lead to the court's order being challenged and set aside at a later date (*Sharland v Sharland* [2015] UKSC 60 and *Gohil v Gohil* [2015] UKSC 61).

[44] It is, of course, clear from the decision of the Court of Appeal in England and Wales in *Vernon v Bosley (No 2)* [1998] 1 FLR 304 at 314–318 that discovery is not simply a one-time event during the litigation process and that parties to litigation have a continuing obligation to give discovery during the time when the proceedings are ongoing. Although the issue does not seem to have arisen yet in this jurisdiction, the obligation may be even more extensive than commonly recognised and may apply even after the hearing has concluded. In the Australian decision of *Boege v Boege* [2002] FamCA 276, Boland J described the ongoing duty of disclosure in the following way:

> "Clearly property proceedings in the Court can only be properly conducted so that parties receive a just and equitable division of their property if each makes a full frank and proper disclosure of their financial affairs. That duty must be an ongoing duty where there has been a material change in one party's circumstances including during any period from hearing until the delivery of a reserved judgment or pending the determination of an appeal."

I find it difficult to disagree with Boland J's approach. Because of this ongoing duty of discovery, which in the light of Boland J's comments may be more extensive than many practitioners have hitherto realised, it would be good practice for legal professionals to inform their clients that they must mention any change in their financial circumstances, or likely change in the foreseeable future, between the initiation of proceedings and their ultimate conclusion.

[45] The duty to make discovery goes beyond what is certain on the date that the order is made and extends to any fact relevant to the court's consideration of the foreseeable future. Any information that is relevant to the outcome must therefore be discovered. Thus, the fact that a spouse is in negotiation with prospective employers for a new job, at greatly enhanced remuneration, is plainly something to be disclosed (*Bokor-Ingram v Bokor-Ingram* [2009] EWCA Civ 412). In *AB v CD (Financial Provision) (Consent Order: Non-disclosure)* [2016] EWHC 10 (Fam) the wife failed to disclose a multi-million investment into a company which may in the future have had an impact on its share price. It is not for a litigant to judge the ambit of the duty

to disclose or the consequences of disclosure; any information which is relevant to outcome must be disclosed.

[46] It sometimes occurs that one of the spouses attempts to frustrate the discovery process. There have been cases where the court is satisfied that a party is "deliberately blocking" the discovery process (*PS v NB* [2023] EWHC 3485 (Fam)) or that there has been a deliberate withholding of discovery (*Goddard-Watts v Goddard-Watts* [2019] EWHC 3367 (Fam)). Such behaviour is often counterproductive and leads to unfortunate consequences, not least disproportionate costs. As Baron J commented in *K v K (Financial Relief: Management of Difficult Cases)* [2005] EWHC 1070 (Fam):

> "This case is an object lesson for all. If a husband does not give proper disclosure, makes threats and causes problems/delays, then the result will be a wife who feels that she has no alternative but to litigate with 'all guns blazing' – taking documents, taping telephone calls, employing private detectives and the like. This strategy will make a husband feel beleaguered so that he becomes more defensive and difficult. It is a vicious circle."

[47] Although speaking in the context of discovery as it applied in a medical negligence action, Lord Donaldson MR's comments in *Naylor v Preston Area Health Authority* [1987] 1 WLR 958 at 967 also have application to ancillary relief litigation. He emphasised that the objective was the achievement of justice and observed:

> "Justice is not achieved by a war of attrition in which survival is a prize to be awarded to the party with the greatest determination and the longest purse."

AGREED FACTS

[48] This was a 21 year marriage. The parties were married in 1994 and separated in 2014. The husband and wife are each aged 56. They have three children who were aged 18, 15 and 8 at the time of separation and are now aged 27, 25 and 17. The matrimonial home, in which the wife and youngest daughter currently live, is in the joint names of the husband and wife and is worth approximately £260,000. It has an equity of approximately £160,000. The wife is in a new relationship but does not live with the man concerned. The husband has a new partner and lives with her in a property which she owns. His name is not on the property title. The wife also owns a 25% share of her parents' home. In respect of this property her brother also owns 25%. Her parents are aged 79 and 85 respectively and they live in the property. The wife works as a part-time classroom assistant. The husband owns and

manages a business. The husband has a pension from his previous employer. The CETV of that pension is £231, 187. The wife also has a small pension with a CETV of £52,451.

THE HUSBAND'S EVIDENCE

[49] The husband's evidence was as follows. The parties have three daughters. The eldest is aged 27 and is a doctor. The middle daughter is aged 25, works as an analyst for a financial institution, and lives in London. The youngest is aged 17 and is still at school. He described having an excellent relationship with his children. He speaks to them daily and meets them for coffees and lunches. In terms of child maintenance, he pays £110 per week in respect of the youngest daughter plus contributions for additional items such as clothes, school trips and a chemistry tutor.

[50] The husband made a unilateral reduction in the amount of maintenance which he gave the wife in respect of the youngest daughter. This came about, he testified, because of frustration on his part as he felt that their daughter was not being adequately looked after. He said that he had received phone calls from her that there was no food in the house. A notable feature in respect of the husband's evidence was that it became apparent that the husband was very controlling in respect of finances. When I listened to his evidence in relation to the family finances, it was clear that the husband was controlling in respect of the financial relationship with these four women in his life. The way he "drip fed" money into their accounts appeared to indicate that he did not trust women with money. This was further indicated by another unilateral decision by the husband to reduce the wife's income because of a car accident involving their youngest daughter. Essentially, he decided that the wife should pay for half of the financial consequences. Since the new understanding of domestic abuse in the form of coercive control which has developed in recent years, the existence of controlling behaviour between a husband and a wife raises a "red flag" which means that the circumstances of the case require closer examination to ensure that this covert form of domestic abuse is not present. I shall examine this issue later in this judgment, under the heading of conduct.

[51] In respect of the wife's ownership of a portion of her parents' home, the husband gave evidence that he was not asking for a share of its value. He stated that, if he could get his share of the matrimonial home, then he would not need any of his wife's inheritance, which he seemed to agree that her portion of her parents' home represented.

[52] In respect of his business, the husband told the court that it dealt with direct marketing and direct mail for various clients. His monthly income from it was never the same but averaged about £3,000 net per month. The business

had three part-time employees and the 2023 Profit and Loss account showed a profit of £40,752.

[53] The husband rejected notions that he had a lavish lifestyle but stated that he and his partner went out at the weekend for eating and drinking. His partner was from Brazil and works for his business, earning some £2,400 per month. The husband suggested that, due to the long hours she works, if he had employed anyone else in her role, the work would have cost twice as much. He conceded that his partner's working status was not mentioned in his affidavit. He told the court that he had not considered it relevant. He is engaged to be married to her and gave evidence that the engagement ring had cost £3,800. The couple make occasional visits to see her family in Brazil and the husband says that she pays the flight costs for those visits. The husband admitted that he had had a three and a half week holiday in Spain. He also admitted that his spending in bars and restaurants during December 2022 was £1,391, in March 2023 was £1,878, and in May 2023 was £1,260.

[54] In respect of his relationship with his new partner, the husband stated in cross-examination that they had been in a relationship since 2015. He conceded that his housing needs were currently met and that his partner owned the property in which they lived. She had bought it for £280,000. Under cross-examination, however, he conceded that in his affidavit he had falsely stated that he resided with his partner in "rental accommodation". Furthermore, a document exhibited to his affidavit in respect of his outgoings included an amount of £119 for "Rent". His explanation for this was that he "felt it was irrelevant" and that he was not trying to mislead. He stated that he made a contribution to the "running costs" of the home.

[55] The husband admitted that he had failed to disclose five different financial accounts. In respect of two of these accounts he gave evidence that he did not know how to print out statements.

[56] In respect of the wife's income, the husband gave evidence that she could do special needs childminding and increase her income that way. When it was put to him that his spending in bars and restaurants alone exceeded what the wife earned, his response was that what she earned was a product of her own decision. He considered that the wife had a greater earning potential. He expressed the view that everyone has the need to make career changes and everyone has to "knuckle down and work". He considered that she could also get equity release from her share in her parents' house.

[57] Miss Brown also cross-examined the husband about his unilateral decision to reduce the wife's maintenance which was done without any prior discussion. The husband described this as an emotional decision made by him out of frustration. He denied it was a spiteful action. He said that he wanted

to send money directly to his youngest daughter. He stated that the wife was receiving a lot of assistance from tax credits.

[58] In respect of the husband's business, his accounts showed that on 28 June 2023 he had received a payment of £43,284. In his evidence he stated that this was from a one-time customer. However, he had to admit subsequently that the customer was in fact a three-time customer.

[59] The husband gave evidence that one of his daughters had told him that the wife had plans to live with the new man in her life in his property in Newcastle.

[60] The husband conceded that there were remortgages of the matrimonial home in 2004 and 2005, each of which raised £25,000 and each of these sums were used to support the business that the husband had at that time. The husband said that that was an informed decision that the husband and wife made together at the time, after legal advice from a solicitor, and that it was an investment to keep the business going.

THE WIFE'S EVIDENCE

[61] The wife gave evidence that the husband gives her £110 per week. The payments are made weekly. It used to be £138 per week but this sum was reduced after the FDR hearing with no explanation. She rejected the husband's evidence to the court that the amount was reduced because his youngest daughter had telephoned him and told him that there was no food in the house and she needed money for food.

[62] The wife gave evidence that the usual sum of money provided by the husband was further reduced after the first day of the ancillary relief hearing. The first payment after the hearing was reduced to £10. The following occasion when a payment should have been made, she received nothing. The wife stated that her daughter had had a car accident and gave evidence that the husband had told his daughter that the wife would have to pay half the cost of the repairs and he would pay half.

[63] The wife emphasised that her husband had been generous to the children in terms of things they needed. She said that she could not fault him in that regard.

[64] The wife explained that, when they married, she was working in the retail sector. After the children were born, she then stayed at home. She stated that she was currently a classroom assistant, having gained an NVQ3 qualification. While she receives Tax Credits and Child Benefit and child maintenance, this was because their youngest daughter was under the age of

18. She told the court that she had made enquiries with the Benefits Agency and had been informed that, once their daughter turned 18, and these sources of income ceased, she would not be eligible for Universal Credit. She stated that rent or a mortgage would become unaffordable if benefits ceased. She herself has no financial capacity to take on the mortgage of the matrimonial home.

[65] She observed that, although she has access to her middle daughter's car as that daughter is living in London, she walks almost everywhere if she can so as to minimise the running costs.

[66] The wife gave evidence that she was in a relationship with a man who works as a pilot and lives in Newcastle. He had never stayed over with her in her home as she would have felt uncomfortable if he did so in the home her children lived in. She has no plans to live with him, get engaged, or get married. She stays with him every other weekend. He gives her no financial support and they have no joint accounts together. She said that her children had encouraged her to accept an invitation which she had received from him to spend Christmas with him abroad. He paid the cost of those flights. Generally, however, she will pay half the cost of everything they do together. She gave evidence that she had had no discussions with her children about moving in with the pilot. She described the relationship as "a dating relationship" and the man as "a bit of an unsettled guy". She does not feel secure in the relationship in the long term.

[67] The wife owns a one quarter share in her parents' home. She received it 20 years ago. He brother similarly owns a quarter share. Her parents are aged 79 and 85. She has discussed the matter with a financial advisor but was told that she could not borrow against her share. Her father was, at the time of the ancillary relief hearing, in hospital. He was shortly to be discharged with the assistance of a care package. She goes regularly to help her parents, as does her brother.

[68] In terms of her financial needs, and in the event that the matrimonial home was ordered to be sold, she has been looking at two bed apartments. To purchase one, she would require £165,000 or a bit more. Even then, that would be the cost if she moved a little further out of town than where she currently resides. Where she now lives would frankly be very convenient as it would be close to the school where she works (which is a 12-15 minute walk) and also close to her parents' house. Nevertheless, in order to buy an apartment to put a roof over her head, she said she would need all the equity in the matrimonial home.

[69] She stated that in terms of lifestyles, her's and her husband's were poles apart.

[70] In terms of discovery, she told the court that she had a Revolut account and an Algbra account. It had been suggested to her by her daughters that she should open these accounts. The former was opened about one year previously. The latter after that. The sole reason she had opened the latter was because she received 1% cashback on her spending when using it. Once she had heard the criticism by counsel on the first day of the hearing of this case in respect of her husband's failure to disclose, she realised that she had not told her legal team about her own Revolut and Algbra accounts. She then obtained copies of the statements on both accounts and gave them to her legal representatives.

[71] She has a small pension. In terms of the husband's pension she observed that the husband had taken some of his Royal Mail pension and invested it but had later told her that that investment "had gone belly up". She had never seen any confirmatory documentary evidence to that effect.

[72] Miss Trainor cross-examined the wife strongly in an attempt to weaken the picture that the wife had presented to the court. In the main this was unsuccessful. The wife gave explanations for her not being able to get further work or better paid work and I found those explanations convincing. The wife had to admit that it was only on the second morning of the of the hearing, some considerable time after the first day on which the court sat, that the discovery in connection with the Revolut account and Algbra account had been handed over to the husband's legal team. Other than that freely given concession, and despite robust cross-examination, the wife's position held firm.

CONCLUSION

[73] I start by considering the factors laid down by Parliament in Article 27 of the Matrimonial Causes (Northern Ireland) Order 1978.

Financial needs of the child

[74] There is one minor child to be considered in this case. She will, however, be aged 18 in a few months' time. Hence the principle that first consideration must be given to the welfare while a minor of any child of the family who has not obtained the age of 18 has limited application. Nevertheless I do not lose sight of the fact that, once children reach the age of their majority they do not immediately become financially independent from their parents, a fact that both the husband and the wife happily acknowledge.

Income and earning capacity

[75] I reject the husband's criticism of the wife earning capacity. The wife is in a weaker financial position than is the husband in terms of income. But I

am of the opinion that she is doing the best that she can in the midst of her family responsibilities.

Financial needs, obligations and responsibilities of the parties

[76] The financial needs of the parties are the central issue in determining the outcome of this application. As she will not be able to take over the mortgage, the wife has a need for new accommodation. The husband does not. His needs are currently met.

The standard of living enjoyed by the family before the breakdown of the marriage

[77] The standard of living enjoyed by the parties during the marriage was comfortable but not extravagant.

The age of each party to the marriage and the duration of the marriage

[78] As stated previously, parties are both aged 56. The marriage lasted 21 years until the separation.

Any physical or mental disability by the parties of the marriage

[79] There was no evidence that either party suffered from any such disability.

The contribution made by each of the parties to the welfare of the family

[80] There was no evidence before the court that the contribution made by either of the parties to the welfare of the family should be taken into account. While neither counsel in this case attempted to argue otherwise, it may be helpful to the wider profession to reiterate what this factor of contribution involves. In *Charman v Charman (No 2)* [2007] EWCA Civ 503 the Court of Appeal for England and Wales held that a special contribution could take a number of forms, non-financial as well as financial. (The court noted that without such clarity, the concept of a special contribution to the welfare of the family would not successfully have been purged of inherent gender discrimination). While the law recognises the concept of a special contribution in the generation of wealth, it keeps the concept in very narrow bounds. In cases of substantial wealth generated by a party's success in business during the marriage the court would have regard to the amount of the wealth and in some cases its amount would be so extraordinary as to make it easy for the party who generated it to claim an exceptional and individual quality which deserved special treatment. Often, however, he or she would need independently to establish such a quality, whether by genius in business or in some other field.

Conduct

[81] It was necessary to consider two types of conduct in this case. Firstly, I had to consider whether the husband had been coercively controlling of the wife. The reason why it became necessary to consider this issue was that there had been clear features of controlling conduct in relation to the family finances revealed by the husband during his evidence. In the Statutory Guidance on domestic abuse, to which I will shortly refer, one of the examples of abusive behaviour is "preventing or controlling access to money". At the time the husband gave his evidence therefore, what was raised in my mind was whether the wife's evidence might contain further allegations which would amount to coercive control by the husband during the marriage. Although ultimately the evidence did not prove the existence of coercive control in this case, I consider it may be helpful to the legal profession to expound in more detail on this issue, given that a widespread understanding of coercive control is yet to develop in this jurisdiction.

[82] Since ancillary relief proceedings involve the gaze of the court being focused on the financial and property relationship of a couple, it is in the field of financial affairs where coercive control may first raise its head. Nonetheless, this is not an area which has seen much exploration. The University of New South Wales, however, published a helpful report "Understanding Economic and Financial Abuse in Intimate Partner Relationships" in October 2020. The report recognises that a clear and consistent definition of economic and financial abuse is lacking. Nevertheless, it stated that the most common tactics of economic and financial abuse identified in the literature were as follows. Firstly, there is "financial abuse" which the report defines as:

> "One partner withholding money, controlling the money in the relationship, failing to contribute to household expenses, making one partner liable for joint debt, appropriating their partner's income or finances, putting bills in one partner's name so the other partner avoids liability."

Unfortunately, this is behaviour which is frequently seen in ancillary relief applications. Secondly, the report identifies "economic abuse" which it defines as:

> "Not allowing or sabotaging their partner's employment or not allowing or sabotaging study, deliberately extending Family Court matters affecting property settlement."

A subsequent report by the University of New South Wales entitled "Legal Responses to Economic and Financial Abuse in the Context of Intimate

Partner Violence", published in June 2023, stated that, in an Australian context, there is limited legal recognition of economic and financial abuse. This lack of awareness amongst legal practitioners and courts may create challenges for victims seeking recourse through the law. Further, the report identified that the evidence demonstrated that perpetrators may use the law and legal systems to their own advantage and to continue to perpetrate economic and financial abuse against victims post-separation.

[83] The determination of whether coercive control has taken place is not a simple task. Coercive control is covert domestic abuse. What the Court of Appeal for England and Wales described in *R v P (Children: Similar Fact Evidence)* [2020] EWCA Civ 1088 as "the subtle and persistent patterns of behaviour involved in coercive control" may be difficult to recognise. Solicitors, counsel and the judiciary all need to develop diagnostic skills to recognise what is, and what is not, coercive control.

[84] A newly qualified doctor may be able to list the symptoms associated with a particular disease but that does not mean that they will be able to diagnose that disease in an actual patient sitting in front of them. So too, a lawyer may be able to list the characteristics of coercive control from legal guidance and yet not have the diagnostic skills to recognise the coercive patterns of behaviour in the life experience of the client or witness sitting in front of them. The introduction of the concept of coercive control requires a new way of seeing. But that potentially leads to the problem that, if legal representatives cannot recognise coercive control in what the client has told them, then they will not be able to present to the court what they do not themselves see. This will affect both the affidavit evidence and the oral evidence offered to the court, each of which are filtered through the understanding and skills of the legal representatives.

[85] Given that there is very little in the way of previous ancillary relief case law which has dealt with the issue of coercive control, ancillary relief practitioners will need to derive an understanding of the concept of coercive control and the way it operates from the fields of children's law and criminal law. In February 2022 the Department of Justice published a Statutory Guidance document under the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 entitled "Abusive Behaviour in an Intimate or Family Relationship – Domestic Abuse Offence" and in February 2024 the Public Prosecution Service for Northern Ireland published a document entitled "Policy for Prosecuting Cases of Domestic Abuse." Each of those documents contain an identical set of examples of abusive behaviour divided into five different categories. (These are located at pages 14-16 of the Statutory Guidance and pages 85-87 of the Prosecution Policy). For ancillary relief practitioners, the examples provide an essential checklist of areas which practitioners may need to explore with clients and witnesses if there is an emerging concern that coercive control may have been present in the client's

marriage. The Statutory Guidance, when read in its entirety, emphasises that the perpetrator's desire to exercise power and control over the victim is at the centre of abusive behaviours.

[86] The Equal Treatment Bench Book, the key work of reference published by the Judicial College for the judiciary in England and Wales, defines coercive control in the following way:

> "Controlling or coercive behaviour does not relate to a single incident. It is a purposeful pattern of behaviour which takes place over time in order for one individual to exert power, control or coercion over another through a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour. It can be a continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim"

[87] As the Court of Appeal for England and Wales held in *Re H-N and Others (children) (domestic abuse: finding of fact hearings)* [2021] EWCA Civ 448:

> "It is now accepted without reservation that it is possible to be a victim of controlling or coercive behaviour or threatening behaviour without ever sustaining a physical injury. Importantly it is now also understood that specific incidents, rather than being seen as free-standing matters, may be part of a wider pattern of abuse or controlling or coercive behaviour."

[88] As Hayden J stated in *F v M* [2021] EWFC 4, which was believed to be the first time the High Court in England and Wales had been called upon to analyse allegations of controlling and coercive behaviour in detail:

> "At risk of labouring the point too heavily, it is crucial to evaluate individual incidents in the context of the wider forensic landscape."

[89] It is vital for the court to adopt a wide perspective of the context of all the evidence rather than to focus on one or two specific incidents. As the Court of Appeal for England and Wales said in *Re H-N* , reducing the field of focus risks robbing the court of "a vantage point from which to view the quality of the alleged perpetrator's behaviour as a whole" and removing "consideration of whether there was a pattern of coercive and controlling behaviour from its assessment."

[90] For counsel, the implications of such judicial statements are threefold. Firstly, when such an allegation begins to emerge from the client's narrative, counsel must ask appropriate questions about the behaviours set out in the Statutory Guidance examples list in order to determine whether patterns of abusive behaviour exist. Secondly, counsel must determine whether it can be proved on the balance of probabilities that, as a matter of fact, those patterns of abusive behaviour have occurred and, if so, the effects and damage which they may have caused in the life of the client. This will require consideration of the available evidence which can be called to support such an allegation. This is what is referred to in the PPSNI and CPS guidance on domestic abuse as "case building". (Counsel may find the more detailed material on possible sources of evidence contained in the CPS "Legal Guidance: Domestic Abuse" document to be of more assistance than the equivalent paragraphs in the PPSNI "Policy for Prosecuting Cases of Domestic Abuse"). Thirdly, although in previous years the evidential focus in respect of "conduct" under Article 27 will often have been upon individual incidents which occurred within brief windows of time (for example, what happened during a thirty-minute period when one spouse stabbed the other), counsel may now, given the legislative changes, have to explore patterns of behaviour which have developed over a ten-year period. This will require a different approach to the presentation of the witness's story in court (see "Prosecuting Coercive Control: Reforming Storytelling in the Courtroom", Vanessa Bettinson and Jeremy Robson [2020] Crim.L.R. 1107).

[91] Unpleasant behaviour of various kinds and degrees may be present in a marriage and sufficient to amount to unreasonable behaviour for the purpose of a divorce petition. That same behaviour may not, of course, reach the legislative standard to be taken into account in ancillary relief proceedings. Parliament has set a high bar for that in the Matrimonial Causes legislation. However, as I held in *Seales v Seales* [2023] NIMaster 6, having regard to the coming into force of the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 and the creation of the domestic abuse offence involving coercive control being punishable with a maximum of 14 years imprisonment:

> "It is clear, in my view, that following the creation of that criminal office, with such a significant maximum sentence, there has to be a major shift in legal thinking and it can no longer be argued (if it ever could have been) that it can be equitable to disregard coercive control conduct by one spouse against the other."

Not least, this will be because of the almost invariable impact of trauma on the ability of a party to engage in financially remunerative work in the short to medium term. As Olivia Piercy and Anita Mehta argue in their article "Is It

Time to Consign the 'Gasp' Factor to the History Books?" (Financial Remedies Journal, 18 October 2023):

> "Coercive and controlling behaviour can erode self-esteem, mental and physical health, isolate victim-survivors from their support network and cause them to lose opportunities, skills, confidence and their professional network or the chance to build one. The financial impact of coercive control can be profound and undeniable, yet unquantifiable, and difficult to isolate."

Such consequences must inevitably feed into needs-based assessments by the courts.

[92] The October 2020 University of New South Wales Report agrees with Piercy and Mehta's strong statement. It states that one of the key learnings in this area is that:

> "Studies showed how economic and financial abuse can lead to a number of adverse consequences, including but not limited to: economic and financial hardship, economic and financial dependence, damaged credit, difficulties getting housing, employment and essential services, lack of sufficient money for necessities and material needs, financial vulnerability, bankruptcy and insolvency, poverty, impoverishment, being in arrears for debts, and lack of financial independence."

[93] The fact that the financial impact of the behaviour may be unquantifiable does not mean that it should not be taken into account in ancillary relief proceedings. In *Tsvetkov v Khayrova* [2023] EWFC 130 Peel J said that a party asserting conduct must prove:

> "… that there is an identifiable (even if not always easily measurable) negative financial impact upon the parties which has been generated by the alleged wrongdoing. A causative link between act/omission and financial loss is required. Sometimes the loss can be precisely quantified, sometimes it may require a broader evaluation."

[94] Coercive control may not simply be seen in the marriage relationship prior to the separation of the parties. Judges hearing cases in which coercive control becomes an issue will, of course, bear in mind that the litigation process itself may be being used as a means of coercive control by one spouse against the other. There is a risk in such circumstances is that, if a court does not act to prevent the abuse of its processes, trauma will be induced upon a

party by the court experience itself. In *Griffiths v Kniveton and Another* [2024] EWHC 199 (Fam) Lieven J recognised that it was a by no means unusual practice in the Family Court for a litigant knowingly to conduct the litigation as a further form of coercive control over another litigant. Similarly, in Australia, a 2017 Parliamentary Inquiry produced a report entitled, "A better family law system to support and protect those affected by family violence." The evidence was that property settlement negotiations could be used as a continuing form of abuse and the Inquiry was informed by one witness:

> "Our research identified a variety of ways property settlements were used as a form of abuse. Examples included abusers intentionally delaying settlement in order to 'negotiate' inequitable settlement amounts; abusers drawing out property settlement to financially exhaust their partners; and abusers hiding information in order to effect inequitable property settlements for victim/survivors."

[95] In ancillary relief proceedings, once it is apparent from the evidence that there has been controlling behaviour by one party, it is incumbent on the court to decide whether or not that control is part of a more widespread coercive control, even if counsel has not argued that this is a "conduct case". This is a consequence of there being a quasi-inquisitorial function vested in the ancillary relief court (*Prest v Prest and others* [2013] 4 All ER 673). As Mostyn J said in *Clarke v Clarke* [2022] EWHC 2698 (Fam):

> "It would be a dereliction of its inquisitorial duty if it allowed a case to be decided under procedural rules and customs which prevented a just decision being rendered on a particular set of facts because a litigant-in-person has, for whatever reason, chosen not to advance the relevant arguments applicable to those facts."

In my view, that obligation on the court is just as true in proceedings where a party is legally represented and the legal representative does not recognise the relevant arguments. Hence, because I was satisfied, after hearing the husband's evidence, that there was clear evidence of controlling behaviour, I was obliged to carefully consider whether this was a possible case of coercive control even if that case had not been made by counsel. Controlling behaviour by its very nature arguably stems from an individual having a controlling personality. Controlling behaviour in one area of a person's life may "leak" into other areas of that person's life. Hence an individual who attempts to control his or her spouse in one area of their life may well attempt to do so in other areas also.

[96] Arguably, one of the key diagnostic factors in recognising coercive control is discerning the existence of trauma. As the Court of Appeal for

England and Wales observed in *Re H-N and Others (children) (domestic abuse: finding of fact hearings)*, the circumstances encompassed by the new definition of domestic abuse:

> "… fully recognise that coercive and/or controlling behaviour by one party may cause serious emotional and psychological harm to the other members of the family unit, whether or not there has been any actual episode of violence or sexual abuse."

Those engaged in ancillary relief proceedings therefore need to be able to distinguish between a person experiencing transient emotional distress caused by having to discuss their broken marriage or by the stress of a court appearance, and an individual who has experienced trauma which has caused lasting adverse effects on that individual's functioning. Currently it appears that the majority of legal practitioners probably lack this skill, particularly the ability to distinguish between what is termed Type 1 and Type 2 trauma.

[97] It must be strongly emphasised that a finding in ancillary relief proceedings that there has been coercive control in a marriage can only be an evidence-based decision which flows from a fact-finding exercise. Often counsel will simply call the party who has experienced coercive control, lead them in telling their story, and hope that the court recognises the patterns of coercive control present in that story. That is, in my view, sometimes an inadequate approach. However, it may be all that is available simply because the obtaining of expert medical evidence may present difficulties for the financially-challenged litigant. When affordable, a better approach to evidencing a genuine case of coercive control will often be through expert medical evidence which supports the conclusion that Type 2 trauma is clearly present as a result of the other spouse's behaviour.

[98] Another method of evidentially proving that coercive control has been present during a marriage or civil partnership is the use of non-medical expert evidence. Expert opinions are admissible to furnish courts with information which is likely to be outside their experience and knowledge. The evidence of experts has proliferated in modern litigation and is often determinative of one or more central issues in a case. It may be that future applications for ancillary relief may ask the courts to receive expert evidence from university academics or witnesses who work for organisations such as Women's Aid as to the patterns they have detected in the evidence of a witness and whether those patterns are sufficiently indicative of coercive control. Once the court is satisfied that the witness is qualified to give expert evidence, then as usual the court will give appropriate weight to the evidence after considering, *inter alia*, the quality of the expert's reasoning, the correctness of factual premises and underlying assumptions, the quality of expert's investigation, the expert's qualifications and reputation, the

objectivity of the expert, the expert's performance under cross examination, and whether the expert has strayed outside their field of expertise.

[99] It must also be strongly emphasised that neither grounding affidavits, nor core issues for FDRs, nor position papers for hearings in ancillary relief proceedings should ever be drafted by counsel in such a way as to label a case as a coercive control case, in the hope of gaining an advantage, where they fail to include evidence to support that allegation by setting out a clear pattern of events which validates that description. I take this opportunity to emphasise again what I emphasised in *Potts v Potts* [2024] NIMaster 4 namely that, where counsel seek to run a conduct case, it is desirable that there is a schedule of conduct with the allegations being particularised with specificity. Genuine cases of coercive control should not be brought into disrepute by unparticularised and unmeritorious cases to which the label of coercive control has merely been added. The Bar Code of Conduct in Northern Ireland states:

> "A barrister who is instructed to draft a statement, affidavit or other pleading is under a responsibility to the court as well as to the lay client and, accordingly, must not make any allegation of fraud unless expressly instructed to plead fraud and there exists material which establishes a *prima facie* case of fraud."

It might be argued that counsel should be similarly circumspect in making allegations of coercive control. Given that the domestic abuse offence in the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 (which essentially criminalises coercive control) provides, upon conviction on indictment, for a maximum penalty of imprisonment for a term not exceeding 14 years or a fine, or both, it must be recognised that, where counsel use the term "coercive control" in a document placed before the court they are making an allegation that the other party has committed a serious criminal offence. Such allegations should not therefore be thrown around lightly. Counsel owe a duty to the court not to advance allegations which they cannot evidentially support. In the event that they do, a wasted costs order, or the reporting of that counsel to the Bar Council, may be the appropriate sanction. I wish to clearly state, however, in making these general remarks, that this issue did not arise in this particular case, where both counsel behaved with impeccable professionalism.

[100] Turning now to the facts of this case, the evidence before me did not reach the standard necessary to make a finding of coercive control which it would be inequitable to disregard. The wife gave evidence that the husband had been financially generous to their daughters and that she could not fault him in that regard. During her evidence she also came across as being strong and confident and, although there was no medical evidence to assist me in

reaching such a conclusion, it did not appear to me that there were any indications that she had suffered emotional or psychological trauma at the hands of her husband. Had there been controlling behaviour by the husband in one aspect of the family's life? Undoubtedly, yes. Had that controlling behaviour caused trauma to be experienced by the wife? Apparently not. I therefore did not take the somewhat controlling conduct of the husband into account in terms of the asset division in this case.

[101] When listening to evidence in such a case, a court must always bear in mind that, where some evidence has been received of an individual having been controlled, this may simply be the "tip of the iceberg" and that the witness's evidence may require to be probed in order to discover what else was present in that person's experience during the marriage. Furthermore, issues of shame, fear and the effect of trauma may be preventing additional evidence on this issue from emerging from the witness. In this particular case, the evidence adduced, while enough to raise a "red flag" and to require me to consider the issue, was not sufficient to justify further exploration of the issue. Had there been one or more other "red flags", such as the deliberate social isolation of the wife or the deliberate undermining of the wife's self-esteem, I might have considered otherwise and might have adjourned the proceedings for the obtaining of additional evidence if that had been necessary.

[102] Following the evidence of the husband, which raised a "red flag" of control issues, no evidence was given by the wife of control that was coercive in nature. However, given the difficulty which exists in recognising the covert domestic abuse which is now termed coercive control, the absence of evidence being led by counsel does not necessarily mean that coercive control is not present. Therefore, once a "red flag" has been raised and identified by the court, the court is not absolved of the responsibility of considering whether there are sufficient facts which might necessitate a fact-finding exercise on this point. Pressure on court resources can never be a sufficient justification for failing to carry out a proper fact-finding exercise into coercive control in circumstances where there are sufficient "red flags" to raise a judicial concern that a pattern of coercive conduct may exist and may be discoverable if the appropriate questions are posed. To think otherwise risks a potential injustice to a litigant who deserves better from the justice system.

[103] I observe that this same process of analysis will also be necessary for counsel and solicitors when they are having their first consultation with a client. The client's account may raise a "red flag" which raises the suspicion of it being a case of coercive control and, as a result, the practitioner may then have to explore with the client a range of other areas of behaviour in the marriage (ideally using the Statutory Guidance examples referred to earlier as a checklist) in order to determine whether or not coercive control has been present in the marriage.

[104] I close this consideration of coercive control with a brief examination of Mostyn J's decision in *Haskell v Haskell* [2020] EWFC 9 which provides a useful example of a number of aspects of coercive control. This was an ancillary relief application involving a husband, born in the USA but now residing in Moscow, who calculated his net worth at minus £50 million. His wife, born in Belarus, claimed by means of an *Imerman* document that the husband's net worth was US $185 million.

Mostyn J observed:

> "19. In January 2019 the husband reached the conclusion that a reconciliation was not going to work and announced that the parties would proceed to a divorce. At that point everything changed. His attitude to the wife became unremittingly punitive. He denounced her as a gold-digger and began a process of financial attrition which has led to the present dire situation where the wife and children are shortly to be evicted from their home in Central London and made homeless.
>
> 20. On 24 January 2019 the husband texted the wife:
>
> > "We must reduce our expenses living separately. I have cancelled the ski trip as it will save £12,000. I will not go to LA. Sorry for the bad news that I had to tell that the reason I started asking for cost reduction is when I realised we have no chance to reconcile."
>
> Two days earlier, on 22 January 2019, the husband told the wife that he had terminated the tenancy over the family home in Central London. The following day he emailed her to say that she had to take over her own telephone contract. The day after that, the very day of his text, he emailed her to say that he had cancelled her membership of the club at 5 Hertford Street. In contrast, his American Express statement records that in the month up to 22 January 2019 he had spent on that card alone nearly $19,000."

[105] Mostyn J concluded:

> "The clear picture that emerges is one of insidious coercive control. The wife and children will only get

> money and be supported by the husband, provided that they bend to his will."

[106] Subsequently, in the view of Mostyn J:

> "The pressure became uglier."

The husband wrote a dogmatic letter to the wife demanding that, in relation to money he provided her with, "she should provide documentary proof of each and every expenditure made from that account, down to the last penny." Mostyn J recognised "the ever-increasing syndrome of control" by the husband. Following an award of maintenance pending suit by the court, Mostyn J noted, "The husband flatly refused to pay what had been ordered and unilaterally decided to pay what he felt was reasonable."

[107] Mostyn J noted that the husband subsequently texted the wife to say:

> "Funny that Cinderella moves to London, leaves her completely retarded daughter in Belarus, moves to London with ur past. Enjoy ur fashion life. Alesia, never forget who gave u the Cinderella life you have. B will be ur responsibility when we divorce."

[108] The husband's coercion then moved into threats to use litigation processes in respect of the couple's children. Mostyn J recorded in his judgment that the husband:

> "… was also able to find time to abuse and threaten the wife, particularly in relation to their profoundly disabled daughter B. On 7 September 2019 he texted the wife to say that he would be filing an application in Belarus for B's custody. This was a remarkably cruel thing to do, and especially striking given that he did not even visit B until she was four years old and did not reveal her existence to his parents and sisters until recently. Of course, no such custody application has been made."

[109] The judgment therefore explicitly notes three examples of abusive behaviour contained in the Northern Ireland Statutory Guidance, namely "control of their access to and use of money", "using children to control them eg threatening to take the children or manipulating professionals to increase the risk that they are removed into care", and "using abusive names to humiliate them."

[110] The decision of *Haskell v Haskell* was decided on the basis of the needs principle. Although Mostyn J did not explicitly mention that he had taken the

husband's coercive control into account as conduct which it would be inequitable to disregard, he did state:

> "It will be apparent from what I have written above that I have taken full account of all the matters mentioned in section 25 and section 25A of the Matrimonial Causes Act 1973."

In the light of that statement, it is difficult to imagine that, having found a "clear picture" of "insidious coercive control", Mostyn J has then disregarded it. *Haskell v Haskell* may therefore be the first recorded ancillary relief case in which coercive control was taken into account by the court as conduct.

[111] The secondly form of conduct which I had to consider in this case was the husband's conduct in relation to discovery. This can be explored with much greater brevity. The husband in his evidence maintained that he had not made discovery of the five financial accounts because they did not represent, or involve the hiding of, additional financial assets. This is not the point. Because "a spouse cannot be allowed to fritter away the assets by extravagant living or reckless speculation and then to claim as great a share of what was left as he would have been entitled to had he behaved reasonably" (*Martin v Martin* [1976] Fam. 335 per Cairns LJ), this means that a party must have the ability to examine the spending habits of the opposing party so that they know whether or not there is a viable "conduct argument". I consider that the husband in this case deliberately failed to make proper discovery. The failure to disclose one or two bank cards or financial transfer mechanisms may be innocent. To suggest that the lack of discovery in respect of five cards was anything other than deliberate stretches the count's credulity. This is particularly so when the husband also failed to disclose that his new partner owned the apartment in which they live. I consider that his declaration that he was paying "rent" amounted to a deliberate lie. By comparison, the wife, although she too failed to make discovery, realised her discovery error and rectified it. I do not, however, consider that her conduct reached the high level where it has to be taken into account under Article 27.

Value of any benefit which by reason of dissolution of the marriage a party will lose

[112] This factor also does not arise for consideration in this case.

Other matters taken into account

[113] Article 27 of Order requires the court to have regard to 'all circumstances of the case'. There are therefore matters which may not fall within the ambit of Article 27(2) (a) to (h) but which may unquestionably be relevant in a given case. In this case there were no such factors.

[114] In terms of the overall assessment of this case, I do not accept the argument advanced on behalf of the husband that this is not a needs case. Nor do I accept his argument that the wife's needs would be adequately met by a 65% share of the equity of the former matrimonial home. In the light of the evidence received by the court it is clear that the wife has a need for accommodation. The husband is in a stable relationship with his new partner. That relationship has been in existence since 2015. They are not only living together but they are working together in the husband's business. He does not in my view have a need for new and separate accommodation. I do not accept the husband's argument that the wife is intending to move into the Newcastle home of the man she is dating. That was either the speculation of the husband or the speculation of one of the couple's children. On the basis of the evidence, I am satisfied on the balance of probabilities that the relationship between the wife and the new man in her life is far less stable than the husband's relationship with his new partner.

[115] I observe that the evidence given in respect of house prices in the area in which she wishes to live could have been weightier. Mere oral evidence that a party has checked online and found that house prices in a certain area are within a particular range is weak. Nevertheless, in the overall circumstances of this case, I am satisfied on the balance of probabilities that the wife does have a need for all the equity in the matrimonial home and I therefore order that she should receive 100% of that equity.

[116] In terms of her needs for a future income upon retirement, I take into account the length of this 21 year marriage, together with the fact that, after the couple's children were born, the wife then stayed at home with them which enabled the husband to work outside the home and continue his career, thus earning a greater pension. Both still have a number of years during which they can work and strengthen their pension situations but the wife does not have sufficient years to make up what she has lost by staying at home to look after the children. Her financial situation will have been, as described by Baroness Hale in *Miller v Miller; McFarlane v McFarlane*, seriously compromised as a result of past family responsibilities. Her relationship-generated need therefore also extends to receiving a 38.6% pension sharing order.

[117] In *M v M* (Financial Provision: Evaluation of Assets) (2002) 33 Fam Law 509, McLaughlin J stated:

> "Where the division is not equal there should be clearly articulated reasons to justify it. That division will ultimately represent a percentage split of the assets and care should be exercised at that stage to carry out what I call a 'reverse check'

> for fairness. If the split is, for example, 66.66/33.3 it means that one party gets two thirds of the assets but double what the other party will receive. Likewise, if a 60/40 split occurs, the party with the larger portions gets 50% more than the other and at 55/45 one portion is 22% approximately larger than the other. Viewed in this perspective of the partner left with the smaller portion – the wife in the vast majority of cases – some of these division may be seen as the antithesis of fairness and I commend practitioners to look at any proposed split in this way as a useful double check."

[118] Applying the reverse check commended by McLaughlin J., I consider this to be a fair division of the assets in the light of a consideration of the Article 27 factors despite the departure from equality.

[119] I am satisfied on the balance of probabilities that the husband's failure to make full and proper discovery was intentional. Not only did he fail to disclose five financial accounts but he attempted to portray his new fiancée's property as a rental property when in fact it was owned by her. He also failed to disclose (until forced to admit it in cross-examination) that he did not pay rent but rather made a financial contribution to their joint living expenses. I conclude that he should be penalised in costs for this litigation misconduct. In agreement with Mostyn J's statement of principle in *OG v AG*, I order that the husband shall pay £10,000 of the wife's legal costs.